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ABSTRACT

Presumption has played a major role in the administration of justice since ancient times, and has a venerable tradition as a component of debate theory. In Cross Examination Debate Association (CEDA) competition, however, the locus of presumption is uncertain. Some authors would place the presumption with one side (typically the negative), while others would leave that determination to the auditor. The test of a legal principle's relevance to debate is whether that principle makes debate more equitable or enhances debate's educational value. In debate, a presumption requiring one side to prove its position beyond a reasonable doubt would be arbitrary and would not improve the educational value of debate. The proof standard of civil litigation, that a proposition be proved by a preponderance of the evidence, would be a better rule for debate. Legal presumptions in favor of values would be difficult to resolve in debate and would be of ambiguous educational value, but would not be inequitable to either side. CEDA could adopt the legal concepts of conclusive presumption, rebuttable presumption, and inference, but should only do so if such rules would improve fairness and increase debate's educational value. (Twenty-three references are listed.) (Author/SG)

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LEGAL PRESUMPTION AND EQUITY:

APPLICATIONS TO PROPOSITIONS OF VALUE

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INTRODUCTION

The concept of presumption has played a major role in the administration of justice since ancient times. In the book of Deuteronomy, believed to have been compiled around the year 650 B.C., it is said that "if you hear of [a transgression], then you shall inquire diligently, and if it is true and certain that such an abominable thing has been done in Israel, then you shall...stone that man or woman to death with stones. On the evidence of two witnesses or of three witnesses he that is to die shall be put to death; a person shall not be put to death on the evidence of one witness" (Deuteronomy 17: 4-6). The concept of "proof beyond a reasonable doubt" in criminal cases was first articulated late in the eighteenth century (In Re Winship 361). More recently, Justice Frankfurter classified this proof requirement as "basic in our law and rightly one of the boasts of a free society" (Leland v. Oregon 802-03).

The concept of presumption also has a venerable tradition as a component of debate theory (e.g. O'neill and Cortright 1931 43). In policy debate, the presumption of innocence given criminal defendants was extended to the status quo. This comparison of indicted persons with indicted policies did not require too great of an inductive leap. The risk inherent in policy change justified a presumption for present policies, much as the risk inherent in convicting an innocent person justified the rule that the accused is innocent until proven guilty.

In CEDA debate, however, the locus of presumption is far less certain. Some CEDA resolutions make value judgments about past or

future government actions. Many other resolutions have objects of evaluation which are not policies. Because different classes of resolutions are debated, it is not surprising to find disagreements about the concept of presumption in CEDA. Some authors have advocated the "stipulation" of presumption, which means that it is given to one side (typically the negative) before the round and it remains with that side (Brydon 1986, Warnik 1981, Young and Gaske 1984). Other authors have advocated the view that presumption should not be stipulated, but rather that it is determined by the auditor. The determination could be based on the values of society (Zeuschner and Hill 1981), the values of the judge and debaters (Matlon 1981), or values established as important during the round (Thomas and Fryar 1981). More recently, Hill has advocated a holistic view of presumption which incorporates stipulated and psychological dimensions of presumption (Hill 1989).

The legal field, with its long history of using the presumption concept, could offer some insight about the role of presumption in the field of CEDA debate. This paper will explore potential uses of legal concepts of presumption in CEDA debate. It will begin by establishing a criteria for the use of legal theories in a debate context. Second, the paper will evaluate the use of legal standards to stipulate presumption in CEDA debate. Third, the use of legal reasoning to create value heirarchies will be considered. Finally, the relevance of conclusive presumptions, rebuttable presumptions, and inferences to

CEDA debate will be considered.

I. CRITERIA FOR TRANSFERRING LEGAL THEORIES TO DEBATE

The temptation to use analogies to legal principles as warrants for substantive and theoretical positions in CEDA debate is understandable. Many of our recent topics have focused on legal issues. Students often become active in debate because they feel it is good preparation for law school. An increasing number of debate coaches have law degrees and/or conduct scholarly research on legal issues such as freedom of speech and communication and the law. When many of the professors and students involved in the activity have an interest in legal issues, there will be a natural tendency to look to the legal field for analogies and evidence when inventing arguments for debate.

However, it is inappropriate to assume that every legal concept can be transferred to the field of debate. The values served by a legal rule may not be the same values it would be appropriate to emphasize in a debate round.

One example of where a legal rule has frequently been misapplied pertains to the issue of extratopicality. When the affirmative team has a case with one topical contention and a second contention that is not topical, negatives often make the claim that the affirmative should lose the round on the topicality issue. To support the claim, negatives point to cases such as Carter v. Carter Coal Company (298 US 238), which articulate the legal rule that "in the absence of such a

provision [that components of a statute are severable] ...if any provision be unconstitutional, the presumption is that the remaining provisions fall with it" (Carter Coal Company 312). In a legal context, the justification for this rule is that the courts are attempting to be faithful to the intent of the legislature. The courts have made a presumption that the legislature would want an act to be effective in its entirety, or not at all (Carter Coal Company 312). This presumption of Congress' intent can hardly be analogized to the affirmative team's intent. If the judge feels that one of two affirmative contentions is a topical warrant for the resolution, the affirmative team would be glad for the judge to vote affirmative on that issue alone.

If a legal principle is to be applied in a debate round, the test of its relevance should be whether that principle either makes debate more equitable or enhances the educational value of debate (1). Debate is equitable when the process insures that each team has an equal chance to win a tournament. Debate rules should produce a "level playing field" so that (to the greatest extent possible) the teams who debate the best win the most. Factors which are extrinsic to measuring the quality of debating should not play a role in the outcome.

A second criteria for testing legal rules used in debate is

(1)If the use of a legal principle would serve one of these goals at the expense of the other, the judge should balance the positive and negative effects on both goals to decide if the legal principle is appropriate.

whether the use of the rule enhances the educational value of debate. As CEDA debate is presently constituted, it is up to the individual judge to define the educational value of debate (or to let the debaters' arguments resolve the issue). The recent CEDA assessment conference provided evidence that the CEDA community has not reached a consensus about how debate can be most educational. But whether one is an "old buffalo" or a "young turk" (or part of the thirtysomething generation in the middle), one would be hard pressed to make the argument that CEDA debate should not be educational.

It is also worth mentioning that legal concepts need not merely function as arguments in an individual debate round--they may also be used to influence judges. A multitude of rules place constraints on judges and juries' decisionmaking choices. In criminal law, a defendant is presumed sane. If a defense attorney did not present evidence of insanity, a juror could not "intervene" and render a verdict of not guilty by reason of insanity because the defendant looked a little crazy. At other times, intervention is mandated. A judge could instruct the jury to disregard evidence, even if that evidence could be relevant to the decision. If they met the equity and educational criteria, legal rules could which place constraints on judges and juries could be employed to place constraints on debate judges (2).

(2)To some extent this already happens. Jurors are expected to vote on the evidence presented, rather than their personal views on the case. No member of the CEDA community would defend a judge whose vote was based solely on his/her personal political philosophy.

This paper will now discuss several aspects of the legal concept of presumption and apply the criteria of education and equity to determine where use of legal presumption would be useful in CEDA debate.

II. THE USE OF LEGAL STANDARDS TO STIPULATE PRESUMPTION

Perhaps the best known application of presumption is the legal rule that a criminal defendant is presumed innocent until proven guilty beyond a reasonable doubt. This concept is often used in debate texts to help explain presumption (Preston and Wood 91, Church and Wilbanks 19).

Application of this standard of presumption to the negative team when nonpolicy propositions are debated would not meet the equity standard. In criminal law, we place such a high value on the good name and freedom of every individual that we would not want to convict a person when reasonable doubt exists (In Re Winship 364). In a debate round, there is no similar value to be served by requiring the affirmative to prove its case beyond a reasonable doubt. If the affirmative team has made a more convincing case than the negative, the affirmative should not lose on the grounds that reasonable doubt remains. In a round between two closely matched teams (which many of the rounds should be in a power matched tournament), the negative should be able to create a doubt about the affirmative's position. If the negative were awarded a win based on a stipulated presumption, an arbitrary rule would prevent an affirmative team which did the better

debating to win the round.

The requirement of proof beyond a reasonable doubt would not enhance the educational value of the activity either. At first glance, it might appear that an argument could be made that a reasonable doubt rule would force affirmatives to abandon "counterintuitive" positions, because it would be easier to cast reasonable doubt on such arguments. However, a negative team could just as easily argue a counterintuitive position and make the claim that the risk of this position being true casts a reasonable doubt on the affirmative case. There is no reason that stacking the deck for either team would enhance the quality of argumentation. The highest quality of argumentation would be achieved if both teams could only win by offering the best arguments in the round. A team should not be encouraged to spend less time preparing the best possible negative arguments by a rule which enables them to win if they can just create reasonable doubt.

A legal presumption rule which would serve CEDA debate well is the standard used in civil litigation. In civil cases, the jury need not be convinced beyond all reasonable doubt. The plaintiff prevails if a there is a preponderance of evidence in his/her favor (Prosser 208). On nonpolicy propositions, there should be a similar rule that

the affirmative team should win if their argumentation(3) is better than the negative's. No special margin of victory should be required of the affirmative team. It would be sufficient for them to do slightly better than the negative side.

Use of the presumption rule taken from civil cases would produce equity between the affirmative and negative. Very few cases in law (Prosser 208) or debate (Patterson and Zarefsky 28) end in a tie. The team that has the better argumentation will win the debate. The only unique burden that is imposed on the affirmative by this standard is the requirement that they must initiate the argumentation (if the affirmative never spoke, they could not have a preponderance of argumentation). It is logical to expect the side which speaks first to present a case (Brydon 21), and once this case is presented, both teams are obligated to provide the better argumentation in order to win. It also furthers the educational value of debate to require the affirmative to present a case because clash on substantive issues is impossible without one. The purpose of withholding a case and challenging the negative to initiate argumentation could only be strategic.

Presumption can also be relevant to the resolution of individual

(3)The generic term argumentation is used to encompass the many components of good argument that different judges emphasize in their decisions. Good argumentation may consist of prevailing on the issues on the flow sheet, excellence in speaking style, best adaptation of arguments to a universal audience, and/or a variety of other factors. The affirmative team should win if they are even slightly better than the negative, based on whatever standards are used to evaluate the debate.

arguments in a debate. One of the most common arguments in CEDA debate is the defense of a value heirarchy. The next section of this paper will consider the use of legal rules of presumption when ranking values.

III. THE USE OF LEGAL STANDARDS TO CREATE PRESUMPTIONS IN FAVOR OF VALUES

There are legal theories which give presumption to certain values. For example, there is the preferred position theory, which pertains to the Bill of Rights. In U.S. v. Carolene Products Co. (304 U.S. 144), Justice Stone wrote that legislation is ordinarily presumed to be constitutional. However, the opinion went on to note that: "There may be a narrower scope for operation of the presumption of constitutionality when legislation apears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments..."(Carolene Products 152-53, fn 4). In the Pentagon Papers case, Justice Douglas wrote of another presumption: "any prior restraint on expression comes to this Court with a 'heavy' presumption against its constitutional validity" (N.Y. Times v. United States 403 U.S. 713).

There is strategic benefit to the use of legal presumptions taken from cases such as Carolene Products and N.Y. Times v. US. It is difficult for debaters to research arguments which give a basis for ranking two important values. The value criteria issue is often hard to resolve in a debate because both teams have identified important values and neither team can give a convincing reason why their value

should always outweigh the other side's value. Nor can either team articulate a precise standard for trading off two competing values (the maxim that it is better to let ten guilty people go free than to convict an innocent is one example of a principle that does advocate a standard). The use of a presumption established in a court case would provide a team with a handy way of resolving the conflict between competing criteria.

The use of legal value presumptions would not be inequitable to the affirmative or negative. They are no different from any other argument which can be researched--the team with more research skill and perseverance will find more good evidence on legal presumptions.

The educational benefit from using legal value presumptions is more ambiguous. The presumptions should not function as decision rules which definitively resolve the value conflict. At most, they are the opinion of one or more justices. The evidence should be evaluated as any other opinion evidence would be--its weight depends on the objectivity and expertise of the source (Fraleigh 49). When a legal background is less relevant to the issue at hand (for example when dealing with medical aspects of the abortion question), the evidence should have less value in the debate.

It is also uncertain whether a judicial decision which creates a presumption for certain values even reflects that court's real opinion of the values' importance. A decision may reflect the justices' use of a value heirarchy which they feel is mandated by the Constitution

(Ulrich 8-9). A court may base its decision on the doctrine of stare decisis, which holds that courts will stand by a precedent and not disturb a settled point. In this case, the decision is only as good as the initial case which established the precedent. Debaters who rely on a line of precedents as good authority for a value heirarchy risk committing the fallacy of appeal to tradition. Thus debaters need to research the court's "reason for decision" and be prepared to defend the relevance of the analysis by which the values were ranked.

In Kovacs v. Cooper (336 U.S. 77), Justice Frankfurter warned against the use of mechanical jurisprudence through the use of oversimplified formulas. This same warning should apply to formulas used in debate. Legal presumptions favoring one value over are relevant evidence, but they should not "trump" all the other arguments on the value heirarchy issue. Legal presumptions can only enhance the educational value of debate when the quality and relevance of the presumptions are debatable issues.

The reasoning process used to resolve the value conflict presented in Gannett v. DePasquale (443 US 368) would provide a method for debaters to analyze competing values that is superior to the "find the highest value" approach debaters often employ now. In Gannett, the issue was whether the media had a First Amendment right to attend a criminal pretrial hearing. The Court was faced with a conflict between two fundamental values--freedom of the press and the right to a fair trial. Rather than creating a value heirarchy, the Court

analyzed whether the trial court had effectively balanced the two competing rights (Gannett 392). The trial court concluded that an open court would pose a reasonable probability of prejudice to these defendants. The court also noted that once the danger of prejudice had dissipated, a transcript of the hearing was made available to the press. Thus, the court held that under the circumstances of this case, the media's right was outweighed by the defendant's right to a fair trial (Gannett 393).

An application of the process used in Gannett to value propositions would enhance the educational value of CEDA debate. When debaters are encouraged to defend "the" highest value, which always takes precedence over the opponent's value, criteria becomes an all or nothing issue in the debate. Debaters have every incentive to invest considerable time arguing about abstract values, rather than debating the substantive issues raised by the resolution and analyzing the extent to which they impact important values. We as judges have conventionalized(4) CEDA to such an extent that we make teams focus on value conflict even when a value heirarchy is not central to a logical

(4)Sommers and Roper define conventionalization as the process by which certain features of debate gain widespread currency among critics and come to be imposed on the process (p. 5). For example, when CEDA debated the topic "resolved, that increased restrictions on the possession of handguns in the U.S. would be justified," virtually every team offered a highest value (typically life). The affirmative risked being labeled "not prima facie" if no highest value or weighing mechanism was offered. If NDT had debated the almost identical resolution, "resolved that increased restrictions on the possession of handguns in the U.S. should be adopted," few teams would offer a criteria. The absence of a weighing mechanism would not be fatal even though the judge would be balancing many of the same advantages and disadvantages under either topic.

resolution of the issues(5). A principal educational value of debate is that debaters learn about major issues confronting society by reseaching and arguing both sides of these issues. An overemphasis on the relative merits of two competing values detracts from this learning experience. Thus, CEDA debate could benefit by taking a page from the Gannett decision and emphasizing "assessment of competing social interests (Gannett 393)" once both teams have highlighted important values, rather than searching for the holy grail of the highest value.

Legal presumption is a multi-faceted concept. Presumptions which are common to society (such as the presumption of innocence), and common to CEDA debaters (such as presumptions in favor of values) constitute a small percentage of the use of presumption in the law. The final section of this paper will analyze these additional dimensions of legal presumption.

IV. THE RELEVANCE OF CONCLUSIVE PRESUMPTIONS, REBUTTABLE PRESUMPTIONS, AND INFERENCES TO CEDA DEBATE

In a legal context, a true presumption is one which deals with inferences drawn from a fact actually proved (the basic fact) to some other critical fact (the presumed fact) (Kadish and Schulhofer 58).

(5)For example, if the affirmative's value is life and the negative's is freedom of expression, few would argue that one life is worth an absolute government right to censor, and few would claim that any amount of deaths would be permissible to maximize one particular form of expression. The extent to which these fundamental values are impacted will be the key to deciding who wins the round.

Presumptions are normally created because they reflect the normal inference which most people would draw from a given set of facts, in the absence of satisfactory definitive evidence (Prosser 210). Therefore it may be presumed that a person is dead when (s)he has disappeared for seven years, a person is presumed to possess normal faculties and reason, and skidmarks justify the assumption that an automobile was driven at excessive speed. Strictly speaking, therefore, the presumption of innocence is not a presumption at all. Most criminal defendants are ultimately found guilty (Kadish and Schulhofer 58). The presumption of innocence reflects a decision to place a high value on safeguarding people from unjust convictions instead of maximizing the number of guilty people we punish (In Re Winship 361-62).

Common legal presumptions include the conclusive presumption (which requires an inference to be drawn regardless of evidence to the contrary) and the rebuttable presumption (which allows evidence to be introduced to disprove the presumed fact). In addition, there are permissible inferences. An inference allows the jury to make a certain presumption from an established set of facts, but also allows the jury to reject that presumption, even if no rebuttal evidence is offered (Kadish and Schulhofer 59).

A relevant aspect of all three presumptions is that they set standards for what a judge or jury can or cannot do. By analogy, CEDA could make use of similar presumptions if the organization wished to

implement policy choices to improve the fairness and educational value of the activity. If legal presumptions are created to further important goals of legal policy, presumptions could be employed in CEDA to further organizational goals. This paper will not defend a comprehensive set of reforms which should be implemented in CEDA through the use of presumptions. It will offer a few examples of what could be done, making no value judgment about the merits of any of these actions at this point.

A conclusive presumption in debate would require a specific decision on the outcome of the round (or an issue) if certain facts were present. The organization could adopt a rule that a team with inadequate communication skills was conclusively presumed to lose the debate. At the opposite end of the spectrum, a rule could maintain that a team which wins the round based on the arguments made in the debate is conclusively presumed to be the winning team. Such a rule would ban judge intervention.

A rebuttable presumption would be less extreme. It would create a presumption in favor of the outcome desired by CEDA under a given set of circumstances, but not function as an absolute ban on any practice. For example, a rebuttable presumption could be imposed against arguments with very low probability (such as a claim that affirmative action on campus would cause the skinheads to start a nuclear war). The argument would be presumed false, but a team whose argumentation skills on the issue were clearly superior could still

win the argument. If the issue was muddled at the end of the debate, the judge would conclude that the issue was false, even if there was some slight risk that the outcome was true.

Finally, an inference would allow the judge to reach a certain conclusion from a set of facts. However, the judge would not be required to reach that conclusion even if no reason to reject the conclusion was offered. One possible use of the inference would be a rule that an inference of a prima facie is permitted if an objective person would agree with the case in the absence of refutation. Matlon (1988) has noted the difficulty of teaching debaters (particularly novices) what the stock issues should be in CEDA debate, given the different expectations of judges (Matlon 6). Debate about the theoretical burdens of a prima facie case can be interesting in an argumentation theory seminar, it is probably not the type of debate any novice joins forensics to engage in. Because there is no consensus regarding the rules for a prima facie case on any given class of propositions, or even on the appropriate classification of propositions (Sommers and Roper 13), any reasonable case could be inferred to be prima facie. Because an inference is merely permitted, a judge would not be expected to accept a case with glaring holes as prima facie. On the other hand, a judge could accept a case as being prima facie even if the negative team pointed out a minor flaw in the first affirmative.

CONCLUSION

Presumption has many different uses in the field of law. Some dimensions, such as the presumption of innocence, have a long history of linkage with academic debate. Other aspects of legal presumption have rarely been applied in the field of debate. This paper has given circumstances in which a legal rule should be applied to CEDA debate, along with some rules that are not applicable. In each case, the governing standard for adoption of a legal rule regarding presumption in CEDA debate should be--will the rule improve the equity between the affirmative and negative team, and will the rule enhance the educational value of the activity?

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